

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of )  
Martin Management Services, )  
 )  
Complainant, )  
 )  
v. ) Case No. 11-883-EL-CSS  
 )  
Columbus Southern Power Company, )  
 )  
Respondent. )

In the Matter of the Complaint of )  
Martin Management Services, )  
 )  
Complainant, )  
 )  
v. ) Case No. 11-1185-EL-CSS  
 )  
Ohio Power Company, )  
 )  
Respondent. )

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Strip, Hoppers, Leithart, McGrath & Terlecky Co., LPA, by Paul Leithart, 575 S. Third Street, Columbus, OH 43215, on behalf of the complainant Martin Management Services.

Matthew J. Satterwhite, 1 Riverside Plaza, Columbus, OH 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On February 16, 2011, and March 4, 2011, Martin Management Services (MMS or complainant) filed separate complaints against Columbus Southern Power and Ohio Power Company (collectively, AEP), in case numbers 11-883-EL-CSS (11-883) and 11-1185-EL-CSS (11-1185), respectively.<sup>1</sup> Both complaints concern electric service for properties which have been placed under receivership. The property at issue in 11-883 is a commercial building located at 90 North High Street, Columbus, Ohio, while 11-1185 concerns a residential property located at 217 East Larwill Street, Wooster, Ohio. MMS stated that it is the court-appointed receiver for each property. In both complaints, MMS alleged that AEP had sent disconnect notices, based on unpaid pre-receivership debt, and that AEP was improperly threatening disconnection of service to each property due to nonpayment of pre-receivership debt. In addition, MMS alleged that AEP refused to allow MMS to establish a new account in its own name. MMS requested a stay of disconnection for each property due to nonpayment of pre-receivership debt, late charges, and any unpaid deposits during the pendency of this complaint, provided that MMS continue to pay all post-receivership billings. In 11-1185, MMS alleged that electric service to the Larwill Street residence had been disconnected, despite the fact that a tenant was occupying the building, and MMS requested that AEP be ordered to reconnect service.

On March 4, 2011, the attorney examiner issued an entry in 11-1185, directing AEP to reconnect electric service to the property and place the account in the name of the receiver during the pendency of the proceeding, under the requirement that the receiver continue to make full payment of all post-receivership bills, and ordered that AEP should not disconnect service to the properties for nonpayment of any pre-receivership debt during the pendency of this matter.

AEP filed answers in both complaints denying the material allegations of the complaints and asserting that these cases involve delinquent customer accounts which are subject to disconnection. AEP contends that the appointment of a receiver does not trump the Commission's primary jurisdiction over the payment of utility service and requests dismissal of the complaints.

A settlement conference was held on April 19, 2011, however, the parties failed to resolve these matters. By entry of June 24, 2011, a hearing was scheduled for July 28, 2011. On July 28, 2011, the parties filed a document entitled "Joint Proposed Agreed Statement of Facts and Issues by Complainant and Respondent" (joint statement). Within the joint

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<sup>1</sup> Martin Management Service, Inc. is the appointed receiver and Reg Martin is the principal for Martin Management Services, Inc.

statement, is a list of agreed-upon facts and statement of outstanding issues in the cases. According to the parties, they have agreed to allow the statement of facts to serve as the hearing required by Section 4905.26, Revised Code, and to brief the three issues based on the agreed statement of facts and issues contained in the joint statement. By entry of August 10, 2011, the parties were directed to file initial briefs by August 22, 2011 and reply briefs by August 29, 2011. Initial briefs and reply briefs were timely filed by the parties.

## II. APPLICABLE LAW

The complaint in this proceeding was filed pursuant to Section 4905.26, Revised Code, which provides, in relevant part, that the Commission will hear a case:

[u]pon complaint in writing against any public utility . . . that any rate . . . charged . . . is in any respect unjust, unreasonable unjustly discriminatory, unjustly preferential, or in violation of law . . . or that any . . . practice . . . relating to any service furnished by the public utility . . . is . . . in any respect unreasonable, unjust, . . . unjustly discriminatory, or unjustly preferential.

In complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667. Thus, in order to prevail, the complainant must prove the allegations in its complaint, by a preponderance of the evidence.

## III. DISCUSSION AND CONCLUSIONS

### A. Agreed Facts

As noted previously, the parties agreed to waive the hearing and, in the alternative, stipulate to the facts which serve as the entirety of the facts in these cases. As part of those facts, the parties incorporated by reference the filings in the foreclosure actions in which the complainant was appointed receiver. The more relevant facts that the parties agreed include the following:

- (1) Reg Martin of Martin Management Services was appointed receiver in two separate cases where property related to customers of two different AEP entities were involved in foreclosure proceedings
  - (a) Ohio Power Company's customer located at 217 Larwill Avenue, Wooster, Ohio

- (b) Columbus Southern Power's customer for the properties located at 90 N. High Street, Columbus, Ohio.
- (2) The records contained in the civil court dockets in each of the cases referenced in item 1 may be relevant to the Commission's consideration in the present cases before the Commission and the parties agree that the documents in those dockets are available to each party for use as evidence in the proceedings in front of the Commission.
- (3) In both of the complaint cases before the Commission, AEP is owed for electric use for dates prior to the appointment of a receiver in the respective foreclosures from the active customer account.
- (4) For the customer account located at 217 Larwill Avenue, AEP is owed for unpaid charges, beyond the current billing period, for electric use and charges incurred after the appointment of a receiver in that foreclosure. Reg Martin was appointed receiver on the property on August 2, 2010. CCM is the customer of record, but is a management company and not the property owner that Reg Martin is serving as receiver for in the receivership proceeding. CCM has been the name on the AEP account since April 28, 2010. Receiver first paid on the account in December 3, 2010. There were unpaid charges for electric use after Reg Martin was appointed receiver. Reg Martin asserts those were unpaid due to issues he experienced dealing with the CCM management group.
- (5) AEP did not transfer this account into the receiver's name as a new account and the account, both pre- and post-receivership, remains in the name of CCM Properties care of Reg Martin, Martin Management as court appointed receiver.
- (6) For the customer located at 90 North High Street, AEP is not owed for electric use, beyond the current billing period, for post receivership debt incurred after the appointment of a receiver.
- (7) For the property located at 90 North High Street, Reg Martin of Martin Management was first appointed receiver by the Court on July 30, 2010; AEP billed the property a deposit, due to

unpaid bills and late charges on those bills, from prior to the appointment of the receiver; and that AEP did not put the account into Reg Martin's name as a new customer as receiver.

B. Issues

The parties also identified issues to be submitted for determination by the Commission in these proceedings. By entry of August 10, 2011, the parties were directed to address additional issues. These issues were selected in order to render a determination as to whether the receiver was required to pay the outstanding AEP utility bills incurred prior to its appointment and whether AEP was required to establish service in the name of the receiver irrespective of whether the outstanding AEP utility bills were paid.

The first issue raised by the parties was whether Ohio Receivership law preempts the Commission's jurisdiction and orders under Title 49 of the Ohio Revised Code. The complainant agrees that the Commission has jurisdiction over these matters; however, it argues that AEP tariffs contain nothing which supersedes Ohio receivership law and the orders of the court which emanate from a receivership. AEP claims that the powers of a receiver under Section 2735.04, Revised Code, do not include any provision related to the regulation of utilities. According to AEP, Ohio receivership law does not preempt the Commission's jurisdiction or orders under Title 49 of the Revised Code. AEP notes that there is no authority given to the receiver under its statutory authority to contradict the power of the regulation of utilities under Title 49, Revised Code.

Both the complainant and the respondent agree that the Commission has jurisdiction over these matters and, thus, Ohio receivership law does not preempt the Commission's jurisdiction over this matter under Title 49 of the Revised Code. In addition, in neither the laws authorizing the appointment of the receiver, found in Chapter 2735, Revised Code, nor the orders granting the motion to appoint the receiver, was the receiver given authority over the jurisdiction of the Commission under Title 49 of the Revised Code, with respect to AEP or any public utility. Having agreed that Ohio receivership law does not preempt the Commission's jurisdiction over this matter, we now turn to the merits of the complaints.

C. Commission Decision

We believe that, based on the facts agreed to by the parties and the documents which are incorporated into the filings in the foreclosure actions, that we have a sufficient evidentiary record to render decision in these matters. As noted previously, the complaint in 11-1185 involves outstanding utility bills related to a property identified as 217 East Larwill in Wooster, Ohio that was "placed into the hands of the receiver" in Wayne County. One of the documents that has been incorporated by reference in these

proceedings is attached to AEP's initial brief and is entitled "Report of Receiver and Application for Approval of Receiver and Counsel for Receiver Fees and Costs." On page two of this document it states: "The property identified as 217 East Larwill, Wooster Ohio also identified as parcel no. 64-00424.000 sold to The Ohio State Bank or its assignee for \$60,000." Based on the language of this document, it is clear that the property that is the subject of the complaint in 11-1185 has been sold. In addition, based on the evidentiary record submitted by the parties, there has been no showing by the complainant that it still has any remaining relationship to the property or that the property is subject to the control of the receiver.

As the building has been sold and the complainant has no control over or relationship to the building, the issues of whether AEP may disconnect service to the complainant and whether the complainant is a new customer for utility service at the building has no relevance to the complaint. Accordingly, this complaint should be dismissed. In addition, nothing in this opinion and order should limit AEP from pursuing any legal remedy in order to recover any AEP utility bills for this property that were due or outstanding up to the date of possession by The Ohio State Bank.

Similarly, the complaint in 11-883 involves outstanding utility bills related to the property identified as 90 North High Street in Columbus, Ohio, that was placed in the hands of the receiver in Franklin County. The two salient issues in this complaint are: (1) whether the receiver is a new customer and (2) whether AEP may disconnect service to the property for nonpayment of utility bills that predate the appointment of the receiver. The complainant has argued that it is a new customer for whom AEP refuses to establish a new account for the property, that it cannot be held responsible for the unpaid utility bills for service at the property, and that liability for those unpaid utility bills remains with the actual customer at the property, that is 90 N. High Partners. AEP acknowledges that it will not establish a new account for the receiver because it believes the receiver is acting on behalf of the account holder as ordered by the court and, therefore, the receiver is not a new customer. Based on the evidence of record, we find that the complainant has not sustained its burden of proof.

There is no argument that if the receiver is a not a new customer, then the receiver would be considered the current customer and the entity responsible for past arrearage and failure to pay that arrearage would result in disconnection of service. That result would be consistent with Commission precedent and treatment of delinquent accounts, as well as AEP's tariff and our rules. However, complainant has argued that it should be considered a new customer. Assuming *arguendo*, that the receiver is considered a new customer, then, when we examine the facts of this case, Rule 4901:1-10-15(k), O.A.C. is applicable. This rule provides, in part, that each electric utility may refuse or disconnect service to nonresidential customers when a former customer (emphasis added), whose

account with the electric utility is in arrears for service furnished at the premises, consumes service at, or has requested service for, such premises. According to the complaint and the facts as stipulated by the parties, 90 N. High Partners is the former customer of record with Columbus Southern Power for the property located at 90 N. High Street, which is a commercial property. Furthermore, 90 N. High Partners is located at the property, consumes service at the property, and for which AEP bills are in arrears. Therefore, based on the complainant's assertion that it should be treated as a new customer, the record evidence, and pursuant to Rule 4901:1-10-15(k), O.A.C., AEP may refuse or disconnect service to the property that is the subject of this complaint because 90 North High Street is a commercial property, there is a past arrearage at that property, created by the former customer which consumes service at the property.

As the Commission has no jurisdiction over the receiver, we cannot direct the receiver to either pay or not pay the past arrearage. Accordingly, if the past arrearage is paid, Rule 4901:1-10-15(k), O.A.C., would no longer be applicable, and AEP would be expected to establish service to the receiver as a new customer, provided that the receiver was creditworthy under Rule 4901:1-10-14, O.A.C., and AEP's applicable tariff. However, if the past arrearage remains unpaid, and the former customer is taking service at the premise, then pursuant to Rule 4901:1-10-15(k), O.A.C., AEP is authorized to disconnect service to the property in accordance with its tariff and the Commission's rules. Lastly, we note that, in the event similar arrearage situations occur in the future, the application of this rule must be applied in a consistent and nondiscriminatory basis. As to any remaining allegations in this case, we find insufficient evidence that AEP has acted unreasonably or unlawfully, or in violation of the O.A.C. rules, Title 49 of the Ohio Revised Code, or the Commission's orders. Accordingly, the complaint should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On February 16, 2011, and March 4, 2011, complainant filed separate complaints against AEP, in 11-883 and 11-1185.
- (2) A joint stipulation of facts was filed in lieu of a hearing and constitutes the entirety of the facts of the case.
- (3) As part of the agreed facts, the parties incorporate by reference the filings in the foreclosure actions in which the receiver was appointed including the orders of appointment and the reports of the receiver.
- (4) Briefs and reply briefs were filed by the parties on August 22, 2011, and August 29, 2011, respectively.

- (5) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 214 N.E.2d 666.
- (6) There has been no showing by the complainant in 11-1185 that it still has any remaining relationship to the property or that the property is subject to the control of the receiver.
- (7) The complainant has not sustained its burden of proof in the complaint in 11-883.

ORDER:

It is, therefore,

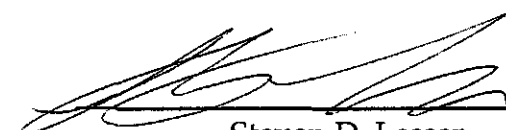
ORDERED, That the complaints be dismissed. It is, further,

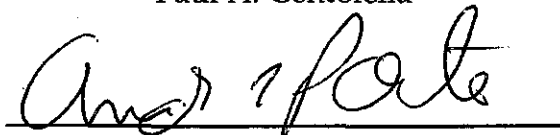
ORDERED, That a copy of this opinion and order be served upon all parties of record.

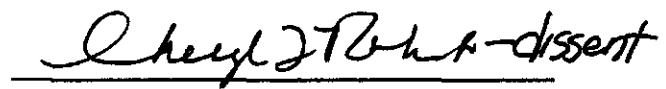
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Paul A. Centolella

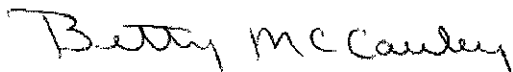
  
Steven D. Lesser

  
Andre T. Porter

  
Cheryl L. Roberto

SEF/sc

Entered in the Journal **NOV 22 2011**

  
Betty McCauley  
Secretary



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DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO

The parties agree in a "Joint Proposed Agreed Statement of Facts and Issues By Complainant and Respondent" that:

- Complainant was appointed Receiver in two separate cases where property related to customers of two different AEP entities were involved in foreclosure proceedings (Agreed Fact No.1); and
- AEP did not put either account into the Complainant's name as a new customer as Receiver (Agreed Fact Nos. 6, and 10(e)).

Because the Complainant sought to be treated as a new customer and AEP declined to treat him as such, the parties ask the Commission to resolve the dispute by answering whether a receiver is merely an extension of an existing AEP customer or whether a receiver is a new customer who is entitled to have service transferred into his name upon his appointment and treated as a new customer. (Agreed Issue No. 3)

To determine this answer, the parties suggest that the Commission address two additional issues: whether Ohio Receivership law preempts the Commission's jurisdiction and orders under Title 49 of the Ohio Revised Code and whether the Commission's rules and regulations preclude AEP from treating a receiver as a new customer on an account once he is appointed as receiver.

A review of Ohio law discloses the following regarding the nature of a receiver. A receiver does not stand in the shoes of the property owner. *McGinness v. U.S. I.R.S.*, 90 F. 33d 143 (6<sup>th</sup> Cir. 1996). A receiver is a ministerial officer of the court. *State v. Fabin*, 17 Ohio Dec. 49 (1906); *Burgess v. Sullivant*, 14 Ohio Dec. 712 (1904). A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation. *In re: All Cases Against Sager Corp.*, 936 N.E. 2d 1034. Without the consent of all parties to an action, a receiver may not be any one of the parties, their attorneys, or anyone else interested in the action. Section 2735.02, Revised Code. Ohio Jurisprudence describes this role thus:

Receivers are court-appointed officers. The status of a receiver, as expressly recognized by the courts, is as merely a ministerial officer – an agent or arm – of the court from which he or she received the appointment, for the benefit of whoever may be ultimately determined to be entitled to the property, and obtains his or her authority by act of the court alone. Under Ohio law, the receiver, as an officer of the court, is not to be regarded as an agent or representative of either party to the action. A receiver is merely the administrative arm of the court who takes charge of assets for the purpose of conserving them to the ends of equity or for the benefit of creditors generally, and in this respect, a receiver is the representative of the creditors.

Receivers, Section 4.

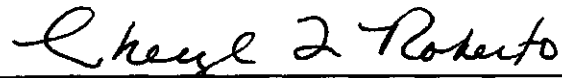
As an entity separate and apart from AEP's existing customer of record for each of the properties and as a representative of the court (and by extension a representative of the existing customers' creditors, including AEP), the receiver is entitled to be treated as a new customer. This status as a new customer will enable the Receiver to conserve the property under his management for the benefit of all of the creditors, including AEP, during the pendency of the foreclosure.

In the instance of the property in Wooster, the majority dismisses the complaint upon finding that the receiver no longer has control over the property. In doing so, the majority notes that "whether AEP may disconnect service to the complainant and whether the complainant is a new customer for utility service at the building has no relevance to the complaint." However, the receiver's current status to the building is irrelevant to the question of whether a violation of a standard of service occurred. Pursuant to Rule 4901:1-23-05, if after hearing, the Commission finds that an electric utility *has* violated or is violating Rule 4901:1-10, the Commission may order the utility to undertake corrective action necessary to protect the public safety, reliability, and customer service. It may also assess a forfeiture up to and including \$10,000 per day per violation. Thus, merely because the receiver has no need for the Commission to order AEP not to disconnect the building formerly in his care in no manner relieves the Commission from its obligation to direct AEP to take action necessary to protect customer service. In this instance, the complainant has established facts sufficient to support an order from this Commission that AEP cease its policy of treating a receiver as something other than a new customer.

In the instance of the property in Columbus, the Commission appears to find that the receiver is not a new customer but that if it were AEP could deny it service pursuant to Rule 4901:1-10-15(k), an argument that AEP does not make. In this instance, the complainant has established facts sufficient to support a finding by the Commission that AEP has failed to treat the complainant as a new customer. In doing so, I would find that the complainant has borne its burden. If AEP wished to argue that despite being a new customer, AEP was acting within the authority granted in Rule 4901:1-10-15(k), when it denied service to the receiver, the burden to establish this affirmative defense to the complaint is upon AEP. As AEP has not argued nor provided evidence in support of this defense, I would find in this instance as well that the complainant has established facts sufficient to support an order from this Commission to cease its policy of treating a receiver as something other than a new customer.

Despite the requirement to treat the receiver as a new customer, AEP may continue to pursue any legal remedy directly against the pre-existing customer to collect unpaid bills. AEP, however, would not be able to disconnect any new customer at the property, including the Receiver acting as an arm of the court for the benefit of all creditors, absent some affirmative showing by AEP that the new customer was not eligible for service. Both as a matter of law and policy, this only makes sense because the property could, to the detriment of all creditors, including AEP and its ratepayers who will ultimately pay for any uncollectible debt, become damaged or lose income as a result of having no electricity. Finally because treating the receiver as a new customer presents no conflict between Ohio's receivership law

and the Commission's jurisdiction or rules, I see no reason to answer the remaining two questions posed. Because there is no dispute that AEP failed to treat the Receiver as a new customer, I would find that the Complainant has successfully sustained its burden of proof in both complaints. Thus, I dissent from the majority opinion.

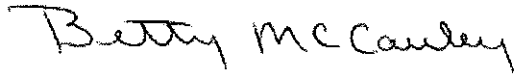


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